

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIM ROEDER)	
Claimant)	
VS.)	
)	Docket No. 227,977
COFFEYVILLE TIRE & AUTO)	
Respondent/Uninsured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) appeals the Award of Administrative Law Judge Jon L. Frobish dated November 5, 1999. Claimant was awarded a 14 percent permanent partial disability to the right forearm for injuries suffered on September 29, 1997.

The Fund contends claimant did not prove his accident arose out of and in the course of his employment and further contends that the Administrative Law Judge erred in considering sections of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, which had not been discussed or placed in the record by the parties. Oral argument was held April 14, 2000.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent, an uninsured, appeared not. The Fund appeared by its attorney, Christopher J. McCurdy of Wichita, Kansas.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge were considered by the Appeals Board for the purposes of this award. In addition, the parties have agreed that, if this matter is found to be compensable, claimant is entitled to an award based upon a functional impairment to the right forearm.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged?
- (2) Did the Administrative Law Judge err in relying on sections of the AMA Guides, Fourth Edition, which were not part of the evidentiary record created by the parties?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board finds as follows:

Claimant alleges accidental injury on September 29, 1997, while installing king pins on a Ford pickup truck. This activity required the use of a hammer and chisel and was described by claimant as being a very physical job, requiring almost constant pounding for several hours. Allen Toliver, a co-employee of claimant at respondent's tire shop, described it as a tough job. Carla Banzet, the respondent's vice president and office manager, described it as a job that "nobody wanted to do." Claimant testified to hammering and chiseling for approximately eight hours on the alleged date of accident. Claimant encountered additional difficulties because the head of the hammer kept coming off the handle, causing his wrist to suddenly snap back and forth. Claimant did not notice any problems at work on September 29, but that night, when claimant went to bed, his right hand and fingers went numb. The next day, claimant called Ms. Banzet, advising his hand was hurting and he needed to go see a doctor. Claimant described it as a paralyzed feeling and it "hurt really bad."

The Fund and Respondent contend claimant's injury actually occurred later the night of September 29, 1997, while claimant was at home working on a car in claimant's garage with Allen Toliver. However, Mr. Toliver was unable to state specifically that the work done in claimant's garage was the night of September 29. In addition, the work performed on this car in claimant's garage only took approximately thirty minutes. Mr. Toliver acknowledged that claimant worked on the king pin job for respondent for approximately eight hours and, in his opinion, the king pin job was a very difficult job to perform.

The Fund and Respondent further contend that claimant worked on several other cars after the alleged injury of September 29, with the auto mechanic's work generally being done either at claimant's home or other locations away from respondent's auto shop. Claimant acknowledges being involved in personal mechanical work on several cars, but denies doing the physical labor. Claimant further denies injuring his right hand and wrist anywhere other than respondent's auto shop.

Certain pictures were placed into evidence which show claimant looking and occasionally leaning over the engine compartments of various vehicles. None of the pictures show claimant physically working on the cars. They merely show claimant standing next to or leaning over cars and looking into the engine compartments.

Claimant was referred to James Wilson, M.D., who had seen claimant earlier that year for a case of poison ivy. Claimant had complaints of numbness in his right hand, with pain into the elbow. Dr. Wilson diagnosed carpal tunnel syndrome in the claimant's right upper extremity.

Claimant was later treated by David O. King, D.O., an orthopedic surgeon, for right hand complaints. This was a self-referral, but ultimately Dr. King became claimant's treating physician by order of the Administrative Law Judge.

EMGs performed on claimant indicated severe carpal tunnel syndrome in the right wrist. Dr. King performed right median nerve decompression surgery on April 8, 1998. He continued treating claimant after surgery and ultimately provided claimant a 5 percent permanent impairment to the right upper extremity based upon the AMA Guides, Fourth Edition. Dr. King testified that, in using the AMA Guides, Fourth Edition, he considered Table 16 on page 57, which deals with upper extremity impairment due to entrapment neuropathy. Dr. King testified that, while the table shows, for a median nerve entrapment at the wrist, 10 percent impairment for a mild condition, he felt claimant's condition to be less severe than mild and felt the AMA Guides intended the 10 percent to be a range from zero to 10 percent. He then assessed claimant a 5 percent impairment based upon the Guides and based upon his own experience as an orthopedic surgeon.

Both Dr. King and Dr. Wilson testified that claimant's right upper extremity difficulties stem from the hammering activities on September 29, while working for respondent.

Claimant was referred by his attorney to Pedro A. Murati, M.D., board certified in Rehabilitation and Physical Medicine. Dr. Murati examined claimant on July 13, 1998. Dr. Murati assessed claimant a 10 percent impairment to the right upper extremity pursuant to the AMA Guides, Fourth Edition, Table 16, and added an additional 4 percent to the right upper extremity for limitations in claimant's range of motion in the right wrist, citing pages 36 and 38 of the AMA Guides, Fourth Edition. Dr. Murati combined the impairments for a 14 percent impairment to the right upper extremity. Dr. Murati also assessed claimant a 34 percent whole person impairment for cervical strain. However, the parties have stipulated that the alleged injury to the claimant's neck is no longer a part of this claim.

The Administrative Law Judge, in the Award, determined Dr. King's use of the AMA Guides, Fourth Edition, was inappropriate, finding Dr. King's 5 percent rating to the right forearm, rather than the 10 percent found in Table 16, to be an inaccurate use of the Guides. The Administrative Law Judge then considered Table 17 on page 57 of the

AMA Guides, Fourth Edition. He found that, as Table 17 provides for a range of values and ratings, but Table 16 does not, then the creators of the Guides must not have intended for Table 16 to include a range of values and ratings, and the doctor's decision to reduce the 10 percent rating to 5 percent was inappropriate. The Administrative Law Judge then discounted Dr. King's opinion entirely.

The Fund contests the use by the Administrative Law Judge of a section of the AMA Guides which was neither discussed nor placed into evidence by the parties. The Fund argues this to be inappropriate and a violation of the rules of judicial notice.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his or her entitlement to the benefits alleged by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

The Appeals Board finds claimant has proven that he suffered accidental injury arising out of and in the course of his employment with respondent on September 29, 1997. The hammering activities described by claimant were described by other employees of respondent as being very physical and difficult to perform. Ms. Banzet described it as a job nobody wanted to do. Claimant acknowledges that he did not experience symptoms during the day, but the symptoms in his hand greatly increased that night. In addition, the alleged night time work on a car at claimant's residence, wherein claimant and Mr. Toliver were changing a pulley, at most, lasted thirty minutes. Plus, Mr. Toliver was not certain on which day that actually occurred. Thirty minutes spent changing a pulley does not compare physically to eight hours using a hammer and chisel.

The Administrative Law Judge criticized Dr. King for not adopting the 10 percent impairment contained in Table 16 for a mild median wrist impairment. Dr. King testified that he did not consider the 10 percent to be mandated, but rather was intended to be used as a guide with the impairment range to be anywhere from zero to 10 percent for a mild upper extremity impairment.

If the Administrative Law Judge is correct in his reading of the Guides, then Table 16 limits any medical opinion when dealing with the median wrist entrapment neuropathy. A claimant would be entitled to a 10 percent impairment if the condition is mild, a 20 percent impairment if the condition is moderate and 40 percent impairment if the condition is severe. There would be no room whatsoever for variation. The Appeals Board does not consider Table 16 to be so limiting. The Appeals Board finds Dr. King's opinion, that the Guides allow for variations from the specific numbers presented, to be appropriate. The Administrative Law Judge's exclusion of Dr. King's opinion regarding claimant's impairment percentage is reversed.

The Appeals Board finds the opinion of Dr. King, claimant's treating physician, to be the most credible and adopts same in awarding claimant a 5 percent impairment to the right upper extremity at the wrist.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated November 5, 1999, should be, and is hereby, modified, and claimant is granted an award against the respondent, Coffeyville Tire & Auto, and the Kansas Workers Compensation Fund, for an injury sustained on September 29, 1997, for a 5 percent permanent partial disability to the right forearm.

Claimant is entitled to 6.72 weeks temporary total disability compensation at the rate of \$176 per week, based upon an average weekly wage of \$264, totaling \$1,182.72, followed by 9.66 weeks permanent partial general disability at the rate of \$176 per week totaling \$1,700.16 for a 5 percent permanent partial scheduled injury to the right forearm, making a total award of \$2,882.88. As of the time of this award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings contained herein.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
M. Doug Bell, Coffeyville, KS
Christopher J. McCurdy, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director